FILE COPY

Office Supreme Court, U. S.
FILED
MAY 18 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

against

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, GEORGE A. ARKWRIGHT and SPENCER B. EDDY, constituting the Public Service Commission of the State of New York, and the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM APPEAL

WHITMAN, RANSOM, COULSON & GOETZ,
Attorneys for Appellant,
40 Wall Street,
New York 5, N. Y.

JACOB H. GOETZ,
RICHARD JOYCE SMITH,
CAMERON F. MACRAE,
BERNARD L. SANOFF,
Counsel for Appellant.

SUBJECT INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Specification of Errors	2
Statement and Summary of Argument	2
Questions Presented	8
Argument	8
I. Substantial Federal questions are presented for this Court's determination	9
1. The basis upon which the constitutionality of temporary rate legislation in New York was first upheld by the Court of Appeals	9
2. The rate base adopted by the Commission in this case for temporary rates under Section 114	16
(a) The Original Cost of Plant in Service	17
(b) The Amount Deducted as "Accrued Depreciation"	18
3. The Commission's admitted failure to consider and weigh relevant evidence on the question of depreciation constitutes a denial of procedural due process	21
4. The effect of the temporary rate order upon the Company's rate of return	28
5. The Commission's resort to the statutory 5 per cent minimum rate of return as an automatic device for fixing temporary	

PAGE

rates, without considering and weighing relevant evidence, constitutes a denial of appellant's constitutional rights 30

6. As presently construed, the provision for recoupment is a completely inadequate and uncertain safeguard against irreparable loss, inflicted upon the Company under the guise of temporary rates 35

7. As presently construed, the laws of New York do not afford a safe and adequate judicial review of temporary rates prescribed by the Commission under Section 114 42

8. As presently construed, Section 114 constitutes a grant of arbitrary power 45

II. The order and judgment confirming the temporary rate order are final for the purpose of an appeal to this Court 47

III. The Federal questions raised herein are not res judicata 48

Conclusion—The Appellees' motion to dismiss or affirm should be denied and this Court should retain jurisdiction of the appeal 50

TABLE OF CASES CITED

American Broadcasting Co. v. *Federal Communications Commission*, 179 F. 2d 437 44

Beaver Valley Water Co. v. *Driscoll*, 28 F. Supp. 722 27

Bluefield Water Works Co. v. *Public Service Commission*, 262 U. S. 679 35

Bradley v. *Richmond*, 227 U. S. 477 46

Brannan v. *Harrison*, 284 U. S. 579 49

Bronx Gas and Electric Co. v. *Maltbie*, 271 N. Y. 364 .....10, 13, 14, 15, 25, 37, 38

PAGE

Chicago Junction Case, 264 U. S. 258 ..... 23, 34
Chicago, M. & St. P. Railway Co. v. *Minnesota*, 134 U. S. 418 45
Consolidated Edison Company v. *Maltbie*, 193 Misc. 1015 42
275 App. Div. 475 ..... 1, 8, 26
299 N. Y. 172 48
300 N. Y. 196 ..... 1, 23, 39, 43
300 N. Y. 645 1
Consolidated Rock Co. v. *DuBois*, 312 U. S. 510 6
Consolidated Water Co. v. *Maltbie*, (see *New York ex rel. Consolidated Water Co.* v. *Maltbie*)
County Transportation Company v. *Maltbie*, 273 App. Div 437, aff'g in part 189 Misc. 743 45

Denny v. *Bennett*, 128 U. S. 489 49
Driscoll v. *Edison Co.*, 307 U. S. 104 ..... 5, 9, 15, 41, 42

Electric Rates, New York City and Suburban Territory, 1 P. S. C. R. (1933) 391 ..... 10, 11

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591 ..... 31, 35
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575 ..... 24, 34

Gibbons v. *Ogden*, 6 Wheat. 448 49
Greyhound Lines v. *Mealey*, 334 U. S. 653 8

Hunt v. *Seeley*, 115 F. 2d 205 49

Interstate Commerce Commission v. *Louisville & Nashville R. R.*, 227 U. S. 88 46

Joslin Company v. *Providence*, 262 U. S. 668 41

Knox Loan Ass'n v. *Phillips*, 300 U. S. 194 48

Mahler v. *Eby*, 264 U. S. 32 44

PAGE

McCardle v. *Indianapolis Water Co.*, 272 U. S. 400.. 30
Morgan v. *United States*, 298 U. S. 468 ..... 24, 34
Moses v. *The Mayor*, 15 Wall. 387 48

New York & Queens Gas Co. v. *McCall*, 245 U. S. 345.. 7
New York Edison Co. v. *Maltbie*, 271 N. Y. 103..... 26
New York ex rel. Consolidated Water Co. v. *Maltbie*, 303 U. S. 158 ..... 6, 7

Ohio Bell Telephone Co. v. *Commission*, 301 U. S. 292 25, 34

Panama Refining Co. v. *Ryan*, 293 U. S. 388..... 46
Prendergast v. *N. Y. Tel. Co.*, 262 U. S. 43 35

Queens Borough Gas & Electric Co. v. *Maltbie*, 245 App. Div. 784 11

Railroad Commission v. *Pacific Gas Company*, 302 U. S. 388 .....23, 27, 34, 35
Rates and Rate Structures, Re, P. U. R. 1933E, 451.. 10, 11
Rates, etc., Yonkers El. Lt. & Pr. Co., 1 P. S. C. R. 1934, 644 14
Republic Gas Co. v. *Oklahoma*, 334 U. S. 62 47
Richfield Oil Corp. v. *State Board*, 329 U. S. 69..... 48
Rockland Light and Power Co. v. *Maltbie*, 241 App. Div. 122 11

Sage v. *City of Brooklyn*, 89 N. Y. 189..... 41
Schechter Corp. v. *United States*, 295 U. S. 495..... 46
Smyth v. *Ames*, 169 U. S. 466 ..... 12, 13
Southern Ry. Co. v. *Virginia*, 290 U. S. 190....24, 34, 44, 46
Southwestern Bell Telephone Co. v. *Public Service Commission* (see *State ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission*)

PAGE

State ex rel. Southwestern Bell Telephone Co. v. *Public Service Commission*, 262 U. S. 276 ..... 12, 26

Staten Island Edison Corporation v. *Maltbie*, 267 App. Div. 72, 292 N. Y. 611; 270 App. Div. 55, 296 N. Y. 374 ..... 39, 40, 45

Syracuse Transit Corporation, Re, 59 P. U. R. (N. S.) 170 36

U. S. v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.. 44

Verden v. *Coleman*, 18 How. 86 49

Walker Memorial Baptist Church v. *Saunders*, 285 N. Y. 462 49

West v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662 40

West Ohio Gas Co. v. *Comm'n (No. 2)*, 294 U. S. 79.. 41

Wichita R. R. v. *Pub. Util. Comm.*, 260 U. S. 48..... 24, 44

Williams v. *Quill*, 303 U. S. 621 49

Wisconsin Telephone Company v. *Public Service Commission*, 232 Wis. 274; 287 N. W. 122 37

Yick Wo v. *Hopkins*, 118 U. S. 356 46

Yonkers Electric Light and Power Co. v. *Maltbie*, 271 N. Y. 364 14

Constitutional Provisions Cited

United States Constitution — PAGE
Amendment 14, Section 1 2

Statutes Cited

Illinois Revised Statutes (Cahill, 1933)
C. 111a, § 51 39
New York Civil Practice Act
Article 78 43
New York Public Service Law
Section 23(2) 48
Section 114 ..... 2, 4, 5, 6, 7, 8, 10, 11, 12, 15, 16, 21, 25, 30, 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 48
Penna. Statutes Annotated (Purdon's, 1941)
Title 66, Section 1150 41
United States Supreme Court Rules
Rule 12, par. 1 2
Virginia Code Annotated (1936)
§ 4071a 39

Miscellaneous Citations

Annual Report, New York Public Service Commission, 1948 ..... 3, 5, 18, 30
Barnes, Temporary Rates in Utility Regulation, 34 Ill. L. Rev. 929 5
II Bonbright, The Valuation of Property (1937) .. 21
Boskey, Finality of State Court Judgments Under the Federal Judicial Code, 43 Col. L. Rev. 1002 .. 49
50 C. J. S. § 620 49
Note, 34 Ill. L. Rev. 214 42
Note, 46 Yale L. J. 505 ..... 5, 28
Public Papers of Governor Lehman (1934) 5, 11, 30
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States 49

POOR COPY
BLEED THROUGH

Supreme Court of the United States

OCTOBER TERM, 1949

No. 824

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

against

MILO R. MALTBIE, NEAL BREWSTER, MAURICE C. BURRITT, GEORGE A. ARKWRIGHT and SPENCER B. EDDY, constituting the Public Service Commission of the State of New York, and the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM APPEAL

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York (Foster, P. J., dissenting), annulling the order of the New York Public Service Commission which prescribed temporary rates for the appellant's electric service, is reported at 275 App. Div. 475. The opinion of the Court of Appeals of the State of New York (Conway and Dye, JJ., dissenting), reversing the decision of the Appellate Division and reinstating the order of the Commission, is reported at 300 N. Y. 196. A memorandum opinion of the Court of Appeals, denying appellant's motion for reargument and amending the Court's remittitur, as requested, is reported at 300 N. Y. 645.

Jurisdiction

Appellant has complied with Paragraph 1 of Rule 12 of the Rules of this Court, and has filed a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction upon appeal. The controversy involves the validity and constitutionality, under Section 1 of Amendment 14 of the United States Constitution, of Section 114 of the Public Service Law of the State of New York, as construed and applied in the instant case, and an order of the Commission made on December 30, 1948, under that statute, prescribing temporary rates for electric service. Appellant contends that the New York Court of Appeals erred in sustaining the validity and constitutionality of the statute and order in question.

Specification of Errors

Appellant adopts, for its specification of errors, the points contained in its assignment of errors filed in this Court.

Statement and Summary of Argument

The so-called "temporary" rates involved in this case were prescribed by the New York Commission more than sixteen months ago. They were established by means of an "across the board" reduction of ten per cent in all the rates (exclusive of fuel surcharge) theretofore charged by the appellant for general electric service, under various service classifications, to its more than 2,300,000 customers in the metropolitan area of New York City.

The reduction was calculated by the Commission* to be in gross not less than $21,500,000 a year, and in net (after

---

* It will be convenient sometimes to refer to the appellant as "the Company", and to the appellees as "the Commission".

POOR COPY

income and gross revenue taxes) not less than $12,427,000. The Commission itself has declared the reduction to be *"the largest single reduction in the history of New York utilities."* (Ann. Rep. N. Y. P. S. C., 1948, p. 14. Italics in original.)

The order of the Commission was made on December 30, 1948, and the prescribed rates became effective on January 10, 1949. Although all of the evidence necessary to be considered by the Commission in determining permanent rates was before it in a record closed on December 2, 1948, a decision on such rates has not yet been announced.

Thus, the peremptory temporary rate reduction has been in effect for more than sixteen months, and, without having made a single finding on any of the evidence before it on the basic issues of depreciation and rate of return, the Commission has required this appellant to forego revenues since January, 1949, aggregating about $30,000,000 and increasing with every day that final action is deferred.

Moreover, when the Commission undertook to make a temporary rate order, after the record had been closed, it was not confronted with a situation where a utility had stubbornly withheld rate reductions to customers. On the contrary, while rate proceedings were going on, the Company put into effect, *on a permanent basis,* electric rate reductions aggregating $15,100,000 per year (R. 26-27).*

The rate proceeding before the Commission began on May 29, 1946. In the course of the many hearings in this proceeding over the ensuing period until December, 1948, evidence was introduced in behalf of the Company, the Commission and several intervenors, relating to various factors to be considered by the Commission in determining just and reasonable permanent rates. Transcripts from

---

* Record references are those in the Record on Review and Appeal in the Court of Appeals.

the books of accounts and records of the Company kept in the ordinary course of business and in conformity with the accounting regulations prescribed by the Commission, as well as the duly verified reports made by the Company to the Commission in the form and containing the data required by the Commission's orders, were also received in evidence (R. 6106, 6107). At the concluding hearing on December 2, 1948, no party to the proceeding indicated the need for additional hearings or evidence on the question of permanent rates. The case was, accordingly, "closed" on the record (R. 6112).

However, the Commission, asserting that it would take "several months" to settle the controversial questions before it, resorted to the device of fixing temporary rates under Section 114 of the New York Public Service Law. That section of the Public Service Law (N. Y. Laws of 1934, ch. 287) empowers the Commission to require public utilities to maintain continuing property records and books, accounts and records showing the original cost of physical property and the reserves accumulated to provide for the retirement or replacement of such physical property, and further empowers the Commission, in a proceeding "involving the reasonableness of the rates of any public utility," to "immediately fix" temporary rates to be charged by a utility company pending the final determination of the rate proceeding. The statute requires that the temporary rates "shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation, of the physical property of said public utility company used and useful in the public service". Under the concluding paragraph of the statute, sometimes referred to as the "recoupment" provision, the Commission is authorized "to consider the effect" of the temporary rates in prescribing just and reasonable permanent rates.

The temporary rate procedure, from its inception, had been recognized as an emergency measure to insure the

POOR COPY

speedy adjustment of utility rates in periods of depression (see Governor Lehman's statement in approving Section 114, quoted *post*, at pp. 30-31; Barnes, Temporary Rates in Utility Regulation, 34 Ill. L. Rev. 929; Note, 46 Yale L. J. 505). Nevertheless, the Commission ordered the present temporary reduction at a time when the Company's employees were calling for large wage increases (R. 6109-12) and when the impact of price inflation upon the cost of utility operations was generally recognized as requiring rate increases (Ann. Rep., P. S. C., 1948, p. 7, topic "1. INFLATIONARY TIDE OVERTAKES UTILITY RATES"). Under such circumstances, responsible and equitable regulation should have dictated not only the utmost caution but strict adherence to constitutional safeguards, if any reduction were to be considered.

An analysis of the Commission's action, however, reveals not only an absence of caution but a flagrant denial of the basic rudiments of fair play. For in its haste to claim the largest rate reduction ever ordered in New York, the Commission has perverted "a carefully guarded device" (*Driscoll* v. *Edison Co.*, 307 U. S. 104, at p. 124) into a vehicle for the exercise of unfettered administrative discretion.

As construed by the Commission and the Court of Appeals in the instant case, Section 114 permits the Commission to predicate temporary rates, of indefinite duration, upon a hybrid formula representing neither the net investment in the entire property of the Company used and useful in the public service nor the fair value of the property, and to adopt, as an element of that hybrid formula, accrued depreciation in an amount exceeding by $95,500,000 the amount of accrued depreciation shown by the Company's books of account and duly verified reports to the Commission, without in any way considering or weighing the conflicting evidence presented by the Company's and the Commission's witnesses and without mak-

ing any findings on the evidence before it.* Moreover, the Commission is permitted to adopt automatically the five per cent statutory minimum as the rate of return, without considering and weighing uncontradicted evidence that the Company required a return of 6.24 per cent in order currently to meet the cost of capital and insure the financial integrity of its enterprise, and without making a single finding as to a reasonable rate of return to be provided by temporary rates.

Appellant contends that, as thus construed and applied in this case, Section 114 is invalid and unconstitutional.

Appellant does not ask this Court to analyze or balance the evidence which was before the Commission to determine whether it preponderates one way or another. Since that is not the purpose of the present appeal, the Commission's emphatic citation (Statement Opposing Jurisdiction, p. 10) of the decision in *New York ex. rel. Consolidated Water Co.* v. *Maltbie*, 303 U. S. 158, is wholly irrelevant. The basis of appellant's claim is that the Commission did not analyze or balance the evidence before it, or make findings based upon the evidence, and that its failure to do so violated appellant's rights under the due process clause of the Constitution. That this Court will examine the record to determine whether such rights have

---

* Section 114 empowers the Commission, where the duly verified reports of the utility company do not show original cost less accrued depreciation, to "estimate said cost less depreciation." However, an analysis of the Commission's opinion fails to reveal any attempt by the Commission to "estimate" depreciation, as that word was defined in *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510. In that case the Court, while recognizing that only an "estimate," as distinguished from a mathematical certitude, could be made of earning capacity, stated (at p. 526):

> "* * * But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity * * *."

POOR COPY

been violated is well settled (see *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 348, cited in the *Consolidated Water Co.* case).

The Commission Counsel's answer to the charge of confiscation and the denial of procedural due process is in the nature of a confession and avoidance. Unable to point to a single statement by the Commission that it considered and weighed relevant evidence of the Company's witnesses on the subject of depreciation and fair rate of return, or to a single finding made by the Commission on either of these crucial factors, the Commission's sole defense is predicated upon the alleged panacea of recoupment. Thus, at one point it is argued that (Statement Opposing Jurisdiction, pp. 12-13):

> "• • • the validity and legality of action taken by the Commission cannot properly be tested by reference to constitutional standards of procedural due process applicable to the taking of ultimate administrative action which would finally affect the property rights involved. Under the New York system of rate-making, integrated within the provisions for judicial review, such constitutional standards are applicable only when the final rates are fixed."

In an attempt to bolster its extraordinary argument that recoupment is a justification for whatever is done in the fixing of temporary rates, the Commission claims that (Statement Opposing Jurisdiction, p. 10):

> "• • • Not a single Justice of the Appellate Division, and not a single Judge of the Court of Appeals, has held or even intimated that, under the proper construction of the statute, the Commission has acted unfairly, unreasonably, arbitrarily or in anywise improperly."

However, the fact is that of the twelve appellate judges who reviewed this case, six agreed that Section 114, as construed by the Commission, would amount to "the grant

of an arbitrary power to determine the temporary rate" (275 App. Div. 475, at p. 481; 300 N. Y. 196, at p. 207).*

The plain and unalterable fact is that, in the sixteen years since Section 114 was enacted, no utility company in the State of New York has ever been granted recoupment. This illusory promise of recoupment has been advanced to forestall judicial review of the confiscatory effect of temporary rates, but its actuality and its remedial efficacy have never been demonstrated.

We submit that the promis of recoupment is not an answer to appellant's claim of arbitrary action on the part of the Commission. Nor is the theoretical right to recoup losses suffered from temporary rates a sufficiently adequate and certain protection to the appellant to warrant the imposition, without according to the appellant procedural due process, of confiscatory rates to be charged for an indefinite period of time.

Questions Presented

Appellees' statement opposing jurisdiction of this Court raises the following questions for decision on the motion to dismiss or affirm:

(a) Whether a substantial federal question has been presented;

(b) Whether the order and judgment confirming the temporary rate order are final for the purpose of an appeal to this Court; and

---

* In the same vein, Counsel to the Commission urges that the constitutional questions are not substantial because the remittitur of the Court below, which was amended as requested by appellant, does not state that constitutional questions "necessarily" were passed upon (Statement Opposing Jurisdiction, p. 6). That this contention is without merit is clear from this Court's recent decision in *Greyhound Lines* v. *Mealey*, 334 U. S. 653.

POOR COPY

(c) Whether the federal questions sought to be raised herein are *res judicata* and thus do not sustain the jurisdiction of this Court.

ARGUMENT

I. Substantial Federal questions are presented for this Court's determination.

The only case in which the validity of a temporary rate statute containing a provision for recoupment has come before this Court is that of *Driscoll* v. *Edison Co.*, 307 U. S. 104. In the *Driscoll* case, this Court, without deciding the question of the constitutionality of the statute, upheld the temporary rate order expressly in the light of the fact that the Pennsylvania Commission took into account all of the elements of value which the decisions of this Court then held to be requisite to a proper rate determination. However, the Court there stated (307 U. S., at p. 114):

> "• • • A different construction would raise the novel and important question of the constitutionality of a temporary rate, based solely on depreciated original cost, with provision for recoupment of the loss from insufficient temporary rates. • • •"

The substantiality of the Federal questions presented upon this appeal becomes more clearly apparent where, as in this case, the Commission's determination of temporary rates was the result of arbitrary action.

1. The basis upon which the constitutionality of temporary rate legislation in New York was first upheld by the Court of Appeals

As is recognized in the Commission's statement opposing jurisdiction (R. 10-11), the issue before this Court is not the constitutionality of temporary rate procedure as that procedure was first construed and applied by the Commis-

sion and the Court of Appeals in *Matter of Bronx Gas and Electric Co.* v. *Maltbie*, 271 N. Y. 364. However, an analysis of the scheme of temporary rate-making there sanctioned highlights the arbitrary nature of the Commission's present action.

Prior to the enactment of Section 114 in 1934, the Public Service Commission, beginning in 1933, had undertaken to by-pass the then established processes for determining just and reasonable rates. It had sought to enforce what it called "temporary emergency rate reductions," after abbreviated hearings, solely upon the basis of the companies' book entries and verified reports as to capitalization, property, depreciation and operating expenses. The method and formula adopted by the Commission were described by its Chairman, at the outset of hearings in its Case No. 6367, in pertinent part as follows (*Electric Rates, New York City and Suburban Territory*, 1 P. S. C. R. (1933) 391; *Re Rates and Rate Structures*, P. U. R. 1933E, 451, 457):

> "After careful consideration the Commission has determined to establish temporary emergency rates *wherever the facts relating to a company as set forth in the sworn reports to the Commission seem to justify such action.* It is not contemplated in the establishment of such rates that a valuation of the property as required by the courts for a final determination will be made. Such valuations require lengthy procedure, wearisome hearings, and often extended litigation.* * *" (Italics supplied.)

In justifying the fixing of a temporary emergency reduction in the electric rates of the New York Edison Company, a predecessor of the present appellant, the Chairman of the Commission again noted that "the sworn reports to the Commission without the adjustment or elimination of a single item" formed the basis of the Commission's action, and that from the book fixed capital "there were deducted the amounts of the retirement reserves and contributions for extensions made by the public which represent no invest-

POOR COPY

ment upon the part of the companies" (1 P. S. C. R. (1933), at pp. 407, 408; P. U. R. 1933E, at pp. 468, 469).

Faced with Court rulings against its emergency rate reductions (see *Rockland Light and Power Co.* v. *Maltbie*, 241 App. Div. 122; *Queens Borough Gas & Electric Co.* v. *Maltbie*, 245 App. Div. 784), the Commission sought enabling legislation. In its annual report to the Legislature in 1933, the Commission, after noting that the basis of the Court actions was the absence of legal authority in the Commission to establish these rates and that the same rule of law applied to temporary rates that applied to final rates, stated (1 P. S. C. R. (1933), at pp. 13-14):

> "As pointed out in the opinions adopted by the Commission, this doctrine would practically nullify the power of the Commission to fix temporary rates, for if a value must be found before a temporary rate can be fixed, action by the Commission will be delayed until the case is nearly or quite ready for final adjudication.
>
> "Appeal has been taken by the Commission from the decisions staying the temporary rate orders, but final determination will not be reached for some time; and in any event, the law should be clarified so as to remove the opportunity for continued litigation and a minimum should be established below which the Commission may not go in fixing temporary rates. In order that justice may be done, the Commission should also be given authority to consider the effects of the temporary rates in its final determination. The Commission suggests legislation to be enacted to carry out these recommendations."

Following the Commission's request, the Legislature in 1934 enacted Section 114, and the Governor, in approving the bill, stated in part (Pub. Papers of Governor Lehman, 1934, p. 637):

> "Under existing law, the Commission has attempted, upon the basis of sworn reports to the Public Service Commission, to order reductions in certain

> instances for a period of one year. In certain other instances, it has found that no reduction should be made and it has so ruled. But in every New York City case where the Commission has attempted to order reduced rates for only one year, the companies have gone to court and stayed the order of the Commission. Tedious legal proceedings are now under way. There is some question whether the Commission has the legal authority to do what it has attempted to do, and the recommendation of the Governor upon this point is to cure any possible defect in the law and to empower the Commission to make temporary reductions where the facts warrant."

And (*id.*, at p. 637):

> "* * * It may be said, however, that it is quite possible the utilities are blind to their own interests and that if the public does not obtain prompt relief, it will have recourse to other measures where prudent, unimpaired investment is not given the protection provided for in the proposed measure."

It would seem apparent from all that preceded the enactment of Section 114 that the sponsors of the temporary rate scheme sought to have adopted for temporary rates the net or prudent investment base (but applied only to physical property), as had been forcefully urged in the dissenting opinion in *State ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U. S. 276, 289-310, in lieu of the fair value base established in *Smyth* v. *Ames*, 169 U. S. 466 (1898). In the *Southwestern Bell Telephone Co.* case, the dissenting Justices had urged (at p. 292):

> "* * * To give to capital embarked in public utilities the protection guaranteed by the Constitution, and to secure for the public reasonable rates, it is essential that the rate base be definite, stable, and readily ascertainable; and that the percentage to be earned on the rate base be measured by the cost, or charge, of the capital employed in the enterprise. * * *"

POOR COPY

In support of the thesis for a "definite, stable and readily ascertainable" rate base, they recounted the experience with the application of the formula laid down by the Courts for determining fair value. They pointed out that "The rule of *Smyth* v. *Ames* sets the laborious and baffling task of finding the present value of the utility," by estimates of reproduction or replacement costs (p. 292), "And finally, it is estimated how much less than the new each part, or the whole, is worth. That is, the depreciation is estimated" (pp. 293-294). They noted that "Several different methods are used for measuring depreciation: (1) The replacement method; (2) the straight-line method; (3) the compound interest method; (4) the sinking-fund method; (5) the unit cost method. It is largely a matter of judgment whether, and to what extent, any one of these several methods of measuring depreciation should be applied. They may give widely different results" (f. n. p. 294).

They continued (p. 294):

> "• • • Obviously each step in the process of estimating the cost of reproduction, or replacement, involves forming an opinion, or exercising judgment, as distinguished from merely ascertaining facts. And this is true, also, of each step in the process of estimating how much less the existing plant is worth, than if it were new. • • •"

The Justices urged, therefore, that (p. 306):

> "The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. • • •"

When the Commission undertook to fix temporary rates in the *Bronx Gas and Electric Co.* case, *ante*, it adhered basically to the pattern prescribed by the Legislature and predicated those rates upon a prudent investment basis. In

that case the Commission, acting before the record was closed and without the introduction of opinion testimony on depreciation, fixed temporary rates designed to provide a return of 6 per cent upon the company's book figures as shown in its reports to the Commission, that is, the original cost of the property, including construction work in progress, less the company's book figures as to the balance in its reserve for retirements (1 P. S. C. R. 1934, pp. 624, 625).*

In sustaining the constitutionality of the course pursued by the Commission in the *Bronx* case, against the claim that temporary rates could not be fixed in advance of receiving evidence of "present value", the Court of Appeals stated (271 N. Y. 364, 372-373):

> "We note at once that the temporary rate shall be sufficient to provide a return of not less than five per centum upon the original cost, less accrued depreciation of the physical property of the utility company used and useful in the public service. At least there is some accuracy in these figures; they can be fixed with some certainty and are not dependent altogether upon speculative expert opinion. (*Clark's Ferry Bridge Co.* v. *Public Service Com.*, 291 U. S. 227.)"

And further (*id.*, at p. 374):

> "The Commission fixes a temporary rate pending the hearing. It is based upon the elements stated, which are not all of those required to fix a permanent rate. As before stated, this would be impossible, if we must consider in fixing a temporary rate all the elements required for the final rate: no temporary

---

* In the case of the *Yonkers Electric Light and Power Company*, 271 N. Y. 364, decided together with the *Bronx Gas and Electric Co.* case, the Commission fixed temporary rates designed to provide a return "of slightly more than 6 per cent" upon the company's book figures, that is, the original cost of the property, including construction work in progress, less the reserve for retirements, as shown on that company's books and verified reports (1 P. S. C. R. 1934, 644, 667).

POOR COPY

rate could ever be fixed. This also is self evident. *Therefore, to meet these conditions the temporary rate is fixed, within reasonable limits, upon figures which can be with some exactness obtained from the books of the company, showing original cost or investment* • • •." (Italics supplied.)

The rationale of the temporary rate scheme as set forth by the Court of Appeals in the *Bronx* case was both clear-cut and simple. Under that scheme, temporary rates were to be established, pending long drawn-out hearings, "within reasonable limits, upon figures which can be with some exactness obtained from the books of the company, showing original cost or investment." The temporary rates were to be fixed at the outset of the hearings, upon a net or prudent investment basis, which obviated the need for "speculative expert opinion", and were to provide a return "within reasonable limits" of the return necessary under just and reasonable permanent rates. Finally, it was considered that if, even with these primary and essential safeguards, the temporary rates proved not to be fully compensatory, the deficiency should be made up in the fixing of permanent rates.

Referred to in the concurring opinion in the *Driscoll* case (307 U. S., at p. 124) as "a carefully guarded device", the scheme of temporary rate-making sanctioned in the *Bronx* case is a far cry from that which the Court of Appeals has accepted as constitutional in the present case. Under the present construction of Section 114, the temporary rate scheme is not a means of avoiding long drawn-out hearings but is a device by which the Commission may avoid its duty to fix permanent rates; the safeguard of a net investment basis, showing the actual dollars invested less those returned by the consumers, no longer exists; speculative opinion of a single Commission witness, without any regard for controverting evidence of other witnesses, forms the basis for action; and the temporary rates no longer provide a return "within reasonable limits" of that anticipated as necessary under permanent rates.

And, we submit, where as in the present case the Commission closes its eyes to evidence before it, makes arbitrary adjustments in book values to support a drastic temporary cut in rates which otherwise would be impossible and delays beyond any reasonable period a promulgation of its findings as to final rates, recoupment is not a safeguard of appellant's constitutional rights.

2. The rate base adopted by the Commission in this case for temporary rates under Section 114

The rate base upon which the Commission predicated the ordered electric rate reduction is tabulated in the Commission's opinion (R. 71-72), and in condensed form is as follows:

Original Cost of Plant in Service as of September 30, 1948		$784,170,696
Depreciation Reserve Per Books	$160,558,055	
Additional Amount Deducted by Commission as "Accrued Depreciation"	95,500,000	
Total Amount Deducted by Commission as "Accrued Depreciation"		256,058,055
		$528,112,641
Less Contributions in Aid of Construction		61,115
		$528,051,526
Materials and Supplies per Books		29,772,023
		$557,823,549
(Rounded Amount)		$558,000,000
Construction Work in Process (Rounded Amount)		38,000,000
Temporary Rate Base		$596,000,000

POOR COPY

(a) The Original Cost of Plant in Service.

The Plant In Service figure is set forth in the Commission's opinion as the "reported book cost of property" (R. 64, 65), and was used by the Commission in arriving at its temporary rate base (R. 211). It represents "original cost" as defined in the Uniform System of Accounts prescribed by the Commission (R. 298), and is the balance remaining after writing off all electric "acquisition adjustments," amounting to $80,000,000. Thus, the current balance of original cost represents a bare minimum of the amounts originally invested in the properties.

The amount of approximately $30,000,000 for materials and supplies was included in the temporary rate base by the Commission as physical property (R. 71, 72). However, no allowance was made by the Commission for other working capital actually employed, principally working cash on hand and funds for expenses advanced by the Company prior to collection of bills from customers, which the Commission recognized would amount to an additional $20,000,000 (R. 65, 67).

Also included in the Commission's calculation of the rate base was the amount of $38,000,000 for Construction Work in Progress. Since practically all of the unfinished construction work representing the expenditure of $38,000,000 at September 30, 1948, was actually completed and placed in service by December 30, 1948, when the Commission made its temporary rate order, and since it was plain from the evidence before the Commission that the balance of this amount—and more besides—would be placed in service during the period for which the temporary rates would be effective, the sum of $38,000,000 reflected only a minimum of that classification of property.

(b) The Amount Deducted as "Accrued Depreciation".

The figure of $160,558,055 is shown in the Commission's opinion as the "book depreciation reserve."* This reserve has been accrued in compliance with accounting regulations of the Public Service Commission, in effect since January 1, 1909 (Exs. 115, 334; R. 1414-19, 5141-42). At no point in the proceeding has there been any challenge of the fact that the Company's reserve for depreciation correctly shows the reserves accumulated to provide for the retirement or replacement of physical property.

Although the Company's verified reports showed that its depreciation reserve, accumulated strictly in accordance with the Commission's general accounting orders and directives, amounted to $160,558,055, as of September 30, 1948, the Commission deducted a total of $256,058,055 (R. 72) or $95,500,000 more than was shown by the Company's reports, from the original cost of physical property, in computing the temporary rate base. According to the Commission, this was done on the ground that (R. 67) "Engineers of the Commission testified that the book depreciation reserve is deficient to the extent of about $96,500,000." Along these same lines, the Commission's statement opposing jurisdiction (R. 6) makes the claim that the testimony of the Company's witnesses showed that the book reserve for depreciation did not show the accrued depreciation of the property.

An examination of the depreciation testimony submitted by the Commission's witness, Mr. Goldthwaite, and

---

* This depreciation reserve is equal to 20.5 per cent of Electric Utility Plant in Service, as compared with an average of 23.2 per cent for all privately-owned electric utilities in New York State outside of New York City at December 31, 1947 (Ann. Rep. P. S. C., 1948, p. 185).

that of the Company's witnesses,* reveals at once the misleading nature of the Commission's claim that any witness had testified to a deficiency in the book reserve. The record shows that the testimony of Mr. Goldthwaite and that of the Company's witnesses was related not to the Company's *accounting* but to a *valuation* question. Thus, Mr. Goldthwaite did not testify at any point that his opinion as to the "depreciation" in the property should supplant the balance in the depreciation account, or that the Company's depreciation is incorrect from the accounting standpoint. He testified (R. 549):

> "Q. How do you define depreciation?
>
> "A. Depreciation is a loss of value."

He explained that "* * * in my estimates I have proceeded as if there were no change in price level. I have not taken into account the increased cost of new equipment which, if allowed, would give an element of appreciation that might offset part of the depreciation" (R. 575).

The Company's valuation witnesses made it clear that their estimates of accrued depreciation dealt with "loss in value" in the economic sense and not with amortization of original cost in the accounting sense. Although related to original cost, the testimony shows that the estimates presented by each witness purported to represent loss in value and that no witness undertook to estimate a deficiency in the book reserve from the accounting standpoint. Thus Mr. Franklin testified (R. 1372):

> "Depreciation is loss in value of property from all causes,"

---

* Theodore E. Seelye, Vice-President of the engineering firm of Day & Zimmermann, Dean A. A. Potter of the Engineering School of Purdue University, Harland C. Forbes, Executive Vice-President of the Company, and Charles W. Franklin, Electrical Engineer of the Company.

and (R. 1373):

> "Q. Why did you apply the [depreciation] percentage figures to original cost?
>
> "A. Because I did not have time to make an adequate investigation as to the extent to which loss in value resulting from expiration of service life has been offset by increased construction costs. Consequently I have been obliged to relate my estimates solely to original cost, *notwithstanding my belief that the resulting dollar estimates on that basis overstate the actual loss in value of the property.*" (Italics supplied.)

Mr. Seelye similarly defined depreciation as (R. 1500) "the loss in value of property from all causes." Under cross-examination by Chairman Maltbie, Mr. Seelye also made it clear that he was not dealing with depreciation from the accounting standpoint (R. 1856-57):

> "Q. Now, is that the amount that the company should have in depreciation reserve as of the end of 1945 for account 311?
>
> "A. *That is not intended to represent the amount required to amortize the investment.*
>
> * * * * * *
>
> "Q. * * * I asked you whether the amount in depreciation reserve for account 311 should be more or less than $9,750,000 as of December 31, 1945.
>
> "A. I have made no estimate of that, sir.
>
> "Q. And you were not asked to express an opinion?
>
> "A. No, sir." (Italics supplied.)

No witness in the proceeding before the Commission testified to a reserve deficiency in any amount. The Commission's statement to that effect is not supported by the record; it is occasioned by a confusion of "loss in value" estimates with "depreciation reserve" figures.

POOR COPY

The distinction between the accounting and valuation terminology on questions relating to depreciation is forcefully made in Bonbright, "The Valuation of Property," Vol. II, p. 1140 (1937):

> "We conclude, then, that when a company has already built up a depreciation reserve, the amount of this reserve should be deducted from the cost of its assets in the determination of a rate base under the 'original cost' principle—not because the reserve measures 'actual depreciation' in an appraisal sense, but rather because it measures amortized capital investment in the accounting sense."

The net result of the Commission's course of action is that it adopted a hybrid rate base, which represents neither the net investment nor the present value of the physical property, and which denies to the Company a return under temporary rates on $95,500,000 of actual investment in property.

3. The Commission's admitted failure to consider and weigh relevant evidence on the question of depreciation constitutes a denial of procedural due process

Having construed the words "accrued depreciation" in Section 114 to relate to the controversial question of "loss in value", then surely procedural due process required that the Commission weigh and consider the conflicting evidence, covering a large part of the record before it,* upon this

---

* Goldthwaite's testimony on depreciation, given on eight separate hearing days, fills 233 pages of the record; Seelye's, given on seven separate hearing days, fills 197 pages; Forbes', given on four separate hearing days, fills 129 pages; Potter's, given on two separate hearing days, fills 83 pages; Franklin's, given on two separate hearing days, fills 53 pages—a total of 695 pages for these witnesses.

question and advance the reasons and factual grounds of its determination. The Commission, however, did not proceed in this manner, but exercised instead an unfettered choice.

From the mass of controversial evidence on depreciation, the Commission plucked the testimony of the single Commission witness, Goldthwaite. Without making findings upon the evidence before it, without considering opposing evidence, without analyzing the "loss in value" existing in the Company's property, without setting forth the reasons and factual grounds of its choice, the Commission *adopted,* as if on faith, the testimony of this favored witness. That the Commission in no way attempted to resolve the depreciation issues in the light of all the relevant evidence is shown by its own unequivocal admission that (R. 66):

> "In addition, the Commission staff claimed a very large deficiency in the book depreciation reserve relating to the electric property. While all of these and many other claims must be disposed of in fixing final rates, no adjustment has been reflected in Table 2 [showing the actual book figures] for any of these items."

According to its opinion, the Commission made no pretension of even reviewing the evidence in the record, for (R. 56):

> "* * * Merely to digest the voluminous record and present the numerous questions to be decided before a whole rate schedule can be framed will take many weeks and probably several months."

Likewise the Commission did not take time to consider these controversial issues of fact, for, as it stated (R. 59):

> "To settle all of these questions will, as already stated, require several months as it is incumbent upon the Commission to make a careful analysis of the facts * * *."

In the light of these clear admissions that the Commission's procedure did not include a consideration of the Company's evidence, and in the absence of a single reference to that evidence in the Commission's opinion, we can only assume that the Court of Appeals misapprehended the nature of appellant's contention, when it stated (300 N. Y. at p. 207):

> "• • • While other and variant figures were in the record, the courts will not and cannot assume that the Commission failed to consider them in reaching its estimate, which concededly was not a final determination."

Under the ruling of the Court of Appeals, a regulatory agency is free to disregard relevant evidence in the performance of its quasi-judicial functions. We submit that the rule thus established is in conflict with the decisions of this Court which define the requirements of procedural due process.

In the *Chicago Junction Case*, 264 U. S. 258, this Court, in striking down an order of the Interstate Commerce Commission, held (at p. 265):

> "• • • The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. • • •"

In *Railroad Commission* v. *Pacific Gas Company*, 302 U. S. 388, this Court, in rejecting a contention that the Commission's action in fixing gas rates constituted a denial of procedural due process, thus stated the essential requirements of that process (at pp. 393-394, 397):

> "• • • When the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, • • • the requirements of procedural due process are met • • •."

> "The Commission was entitled to weigh the evidence introduced * * *. The Commission was entitled to determine the probative force of the respondent's estimates. That the Commission did so is apparent from both its statement to that effect and the reasons it gives for considering these estimates to be without positive value. * * *"

In *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48, this Court, in striking down a rate order of a state regulatory agency, stated (at p. 59):

> "* * * In creating such an administrative agency the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined *and show a substantial compliance therewith* to give validity to its action." (Italics supplied.)

See, also:

> *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, 198;
> *Morgan* v. *United States*, 298 U. S. 468, 480;
> *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584.

In an attempt to extenuate the arbitrary nature of the Commission's action, its Counsel argues (Statement Opposing Jurisdiction, pp. 7, 12-13): (1) that "A complete analysis of the extensive testimony and exhibits relating to depreciation, and the making of a final and conclusive determination of the accrued depreciation of the properties would have consumed a prohibitive period of time",*

---

* The testimony on accrued depreciation was virtually completed at the hearing of January 6, 1948 (R. 4213), almost a full year before the making of the temporary rate order. The accrued depreciation testimony after that date related to arithmetical extensions of the exhibits to a later date, and fills less than 30 pages of the record (R. 4532-42, 4679-85, 4759-65, 5275-79).

and (2) that "the validity and legality of action taken by the Commission cannot properly be tested by reference to constitutional standards of procedural due process applicable to the taking of ultimate administrative action which would finally affect the property rights involved."

The answers to such arguments are readily made.

First. In the Court below, one of the appellant's arguments was that an interpretation by the Commission of "accrued depreciation" as "loss in value" would necessarily resurrect the very vagaries and uncertainties of resort to controversial opinion testimony which the net investment theory of Section 114 was designed to avoid. That the statutory objectives of expedition and promptness could have been satisfied, and the present constitutional issue avoided, by adhering to the scheme of Section 114 as interpreted and applied in the *Bronx Gas and Electric Company* case, *ante,* is clear. But the fact that the Court below did not thus preserve the statutory objectives is not a valid reason to seek before this Court the same result at the expense of established principles of procedural due process.

This Court has held that a denial of the minimal requirements of due process cannot be rationalized on the ground that the Commission did not have time to weigh all the evidence. As stated by Mr. Justice Cardozo (*Ohio Bell Telephone Co.* v. *Commission,* 301 U. S. 292, 305):

> "* * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Second. Although the Commission concedes at one point (Statement Opposing Jurisdiction, p. 12) that the recoupment provision cannot authorize arbitrary action in the fixation of temporary rates, in the next sentence (*id.,* at pp. 12-13) it argues that the very constitutional standards

which protect the appellant against such action are inapplicable in this case. If the Commission is not required to consider and weigh evidence and to make findings thereon, the protection afforded by a hearing is meaningless.

In his dissenting opinion in the *Southwestern Bell Telephone Co.* case, cited *ante* at p. 12, Mr. Justice Brandeis noted that there were several different methods for measuring depreciation, some of which "give widely different results." The Appellate Division also noted in its opinion in this case (275 App. Div. 475, at p. 481) that "More than a half dozen recognized methods of computing depreciation are in use by accountants", and that "If all of these methods were applied to the same problem as many different results would be produced as there were methods employed."

If the Commission has the power to choose from any of these methods to obtain the particular result desired, if it is unhampered by the need to consider and weigh conflicting evidence or the need to advance the reasons for its choice, then the Commission possesses and has exercised the very arbitrary power which it concedes recoupment does not authorize. As the Appellate Division stated (275 App. Div. 475, at p. 481):

> "* * * If the contention of the respondents were sustained the Commission could always resort to an estimate by the simple expedient of adopting a method of computing depreciation which would produce an amount in excess of that produced by the method used by the utility. *In result this would be the grant of an arbitrary power to determine the temporary rate.* * * *" (Italics supplied.)

Indeed, the Court below, at an earlier date, recognized that the action of the Commission in prescribing certain accounting requirements for public service corporations was a "judicial act" which required the protection of a fair hearing. Thus, in *Matter of New York Edison Co.* v.

Maltbie, 271 N. Y. 103, the Court below held invalid, under the Federal Constitution, the Commission's attempt to impose upon utility corporations the straight-line method of accounting for depreciation, without receiving and considering sworn testimony and making "findings" based thereon (*id.*, at p. 104).

At a later point (see pp. 35-42, *post*), we discuss the inadequacy and illusory nature of recoupment as a remedy for confiscatory rates. But even if it is assumed, *arguendo*, that recoupment does operate to prevent loss, the Commission's argument fails to recognize the essential point that procedural due process under the Constitution is not satisfied by merely avoiding confiscation. The distinction between these claims was pointed out by this Court in *Railroad Comm'n* v. *Pacific Gas Co.*, 302 U. S. 388, 392-393, as follows:

> "As the District Court did not deal with the issue of confiscation and the evidence is not before us, we are concerned only with the question of procedural due process, that is, whether the Commission, in its procedure, as distinguished from the effect of its order upon respondent's property rights, failed to satisfy the requirements of the Federal Constitution. We examine this question in the light of well settled principles governing the proceedings of rate-making commissions."

The sole authority which the Commission claims for its extraordinary contention that constitutional standards are inapplicable to the present situation is the case of *Beaver Valley Water Co.* v. *Driscoll*, 28 F. Supp. 722. In that case, the Commission fixed temporary rates, at the outset of the hearings, upon depreciated original cost plus working capital and materials and supplies. The rates were designed to provide a return of 6 per cent upon this rate base.

No claim was made by the Water Company that the Pennsylvania Commission had failed to consider evidence on the limited factors established as the basis for fixing

temporary rates. The company's claim was that procedural due process had been denied because it had not been permitted to introduce evidence on fair value factors not enumerated in the statute. In the present case, however, appellant's claim is related not to the limited nature of the factors to be considered in fixing temporary rates but to the denial of the Company's right to have its evidence upon those limited factors considered and weighed by the Commission and findings made thereon.

We respectfully submit that the procedure pursued by the Commission denied to the Company the basic rudiments of fair play and that this arbitrary denial is in no way justified by the alleged temporary nature of the rates in question. As one commentator has stated (Note, 46 Yale L. J. 505, 509), due process of law must be accorded to a utility, "even if the new rates are provisional and temporary" and a final rate "is to correct whatever deficiencies are discovered in the temporary schedule."

4. The effect of the temporary rate order upon the Company's rate of return

The effect of the temporary rate reduction upon the Company's income from electric operations may be *initially* demonstrated by an analysis of the relation of that reduction to the twelve months' period ended September 30, 1948, which period was adopted as the "base year" in the Commission's opinion. As indicated in the Statement Opposing Jurisdiction (p. 8), the analysis shows that the Company's operating income for the twelve months' period ending September 30, 1948, would have been reduced to *$30,261,410*.

As we have shown (p. 16, *ante*), the rate base of $596,000,000, upon which the Commission predicated the ordered rate reduction, understates the Company's net investment in physical property by $95,500,000. Since a net investment base of original cost less reserves per books—the actual dollars invested by the stockholders less those

returned by the consumers—amounts to $691,500,000, the operating income would represent a return of only *4.38 per cent*. Moreover, the $691,500,000 upon which the 4.38 per cent is calculated represents only the Company's actual investment in *physical* property and does not include $20,000,000 of other elements of working capital which the Company necessarily provided in order to render service to the public (see p. 17, *ante*).

Upon the Commission's rate base of $596,000,000, the operating income represents a return of *5.07 per cent* (see Statement Opposing Jurisdiction, p. 9). In addition to the exclusion of $20,000,000 in working capital, the Commission's adoption of this rate base denied a return on $95,500,000 of actual investment by the Company's stockholders.

Important to note is that the above rate of return computations afford only an *initial* demonstration of the effect of the temporary rate reduction upon the Company's income, because the operating income figure of $30,261,410 is related to a "base year" which began some 15 months and ended some 3 months before the temporary rates were to become effective.

In particular, the income figures for the "base year" ended September 30, 1948, upon which the Commission based its order, reflect only 9 months of the 1948 wage increases, estimated to approximate $4,227,000 on an annual basis for electric operations (Ex. 310; R. 4742-47). Moreover, at the last hearing before the Commission, counsel for the Utility Workers Union of America, C. I. O. (the certified bargaining agent of all eligible employees of the Company) pointed out that substantial wage increases of "15 cents across the board" were being sought (R. 6110), a matter in which each of the Company's 26,000 employees had a vital interest (R. 6111). However, the labor union counsel's request for consideration was given short shrift by the Chairman of the Commission (R.

6111-12). No consideration was given in the Commission's opinion to these inescapable increases in labor costs.

The Commission's failure to make "an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future" (*McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 408) is made abundantly clear by the following admission which appears in the Statement Opposing Jurisdiction (p. 8):

> "* * * In projecting the prospective annual revenues and expenses for the temporary rate period, the Commission adopted appellant's own book figures for the base year ended September 30, 1948, *adjusted only for estimated taxes* * * *." (Italics supplied.)

It is significant also that while ignoring evidence of rising costs in the present case, the Commission itself was already on record that the impact of price inflation upon the cost of utility operations was generally requiring rate increases. (Ann. Rep. N. Y. P. S. C., 1948, p. 7, topic 1. "INFLATIONARY TIDE OVERTAKES UTILITY RATES").

5. The Commission's resort to the statutory 5 per cent minimum rate of return as an automatic device for fixing temporary rates, without considering and weighing relevant evidence, constitutes a denial of appellant's constitutional rights

When Section 114 was enacted by the Legislature and approved by the Governor, it was anticipated that the Commission would fix temporary rates to provide the minimal 5 per cent only during periods of stringent depression, and certainly not under the inflationary conditions which prevailed when the Commission's present action was taken. Upon this point Governor Lehman said in 1934, when he approved the Section 114 bill (Pub. Papers of Governor Lehman, 1934, p. 637):

> "The bill also fixes a *minimum* [italics in original] amount below which the Commission may not go in fixing temporary rates. It does not prescribe a maximum but leaves the Commission to determine

the exact rate under the conditions that obtain. The minimum rate of return fixed in the bill is 5 per cent and the question naturally arises why should it be 5 per cent.

"In the first place, any minimum that is fair must be adapted to the most unfavorable conditions. If there were no depression, it would undoubtedly be true that a 5 per cent return would not be a reasonable rate, because it would not be a return that is actually being earned by private companies in competitive business operating under similar risks and similar conditions. But at present and for over three years, private companies have not earned 5 per cent. Many of them have not even paid operating expenses."

However, under the Commission's construction of Section 114, sanctioned by the Court below, the statutory 5 per cent minimum assumes a vastly different function. Rather than a minimum to be invoked only under the "most unfavorable conditions", the 5 per cent rate of return is now available to the Commission as an automatic device for fixing temporary rates. According to the Commission (Statement Opposing Jurisdiction, p. 9), "The statute provides only that the return must not be less than 5 per cent." In other words, the requirement that temporary rates "shall be sufficient to provide a return of not less than five per centum" is now construed to authorize the fixing of temporary rates "sufficient to provide a return *of only* five per centum."

By this perversion of the meaning of the minimal requirement, the Commission was enabled to fix temporary rates in the present case solely with reference to a 5 per cent rate of return, without considering and weighing uncontradicted evidence in the completed record that such rate of return was insufficient to assure confidence in the financial integrity of appellant's enterprise so as to maintain its credit and to attract necessary capital (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591). To

hold that the Commission need only make a mathematical calculation of a 5 per cent return is to deny to appellant the protection of procedural due process and to confiscate its property without due process of law.

The uncontradicted evidence in the record before the Commission showed that on the basis of the Company's capital structure and the experienced cost to it of raising its outstanding capital, the required rate of return was not less than 6.24 per cent. Evidence based on the cost-of-capital method was presented for the Company by two witnesses having extended experience in financing, accounting, rate of return and other regulatory matters.

Charles Nodder, Assistant Secretary of the Company, testified regarding the cost to the Company of its debt and preferred stock capital as of December 31, 1946 (R. 1554-93), and later brought his data forward to June 30, 1948 (R. 5886-5905). In order to show the rate of return to which the Company is entitled for its common stock, testimony was presented by J. Rhoads Foster, utilities consultant and lecturer on public utilities regulation at New York University (R. 1595-1601).

Having found the cost of capital for the individual classes of securities composing the Company's capital structure, a determination was made of the total overall cost of capital to be used in establishing a fair rate of return for the Company's electric business. This determination was first made by Mr. Foster (Ex. 127) in January 1947, and later brought up to June 30, 1948, by Mr. Nodder (Ex. 370) to reflect the changes which had occurred in the Company's capital structure.

As of June 30, 1948 and on the basis of the Company's capitalization ratios, the following composite cost of the total capital was derived (Ex. 370):

	% of Total Capital	*Average Cost per Dollar*	*Components of Cost of Total Capital*
Bonds and Debentures	33.9	2.95%	1.00
Preferred Stock	17.3	5.52%	.95
Equity Capital	48.8	8.8 %	4.29
Total	100.0%		
		Average cost per dollar of Total Capital	6.24%

This cost-of-capital evidence was buttressed by the testimony of a third witness for the Company, Adrian H. Massie, banker and Vice President of the New York Trust Company, who expressed the opinion that the Company required an overall return of 6.5 per cent from its electric business in order to maintain and support its credit and raise money necessary for the proper discharge of its functions (R. 1737).

The testimony of the three Company witnesses was not opposed by counter-evidence.

Evidence was also introduced which showed that, for the ensuing several years, the Company was faced with a construction budget of unprecedented proportions in order to render the "safe and adequate" service required by law. To a large extent the construction program is required to restore operating reserves which had almost disappeared because of war-time restrictions on the availability of materials and labor (R. 1712-21; Ex. 146, Forbes).

Obviously, the Company will need to resort to extensive financing, if it is to meet its obligations. And if this financing is to be done without distorting the Company's capital structure and making it top-heavy with debt, the Company will have to resort to equity financing. To make

this possible, it is essential that the Company's rates provide a return at least equal to its experienced cost of capital.

In the face of this uncontradicted evidence as to the experienced cost of capital to the Company, the Commission fixed temporary rates designed solely to satisfy the statutory minimum of 5 per cent. Not a single reference to the Company's evidence, either denying or affirming its probative force, not a single finding as to a reasonable rate of return, and not a single indication that the Commission so much as glanced at this testimony, appears in the Commission's opinion. We submit that this arbitrary course of procedure constitutes a denial to the appellant of procedural due process of law.

The Chicago Junction Case, 264 U. S. 258, 265;
Southern Ry. Co. v. *Virginia*, 290 U. S. 190, 198;
Morgan v. *United States*, 298 U. S. 468, 480;
Ohio Bell Telephone Co. v. *Commission*, 301 U. S. 292, 305;
Railroad Commission v. *Pacific Gas Company*, 302 U. S. 388, 392-394;
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583-584.

Moreover, the Commission's order which was designed to yield a return of no more than 5.07 per cent upon a hybrid rate base which understated the Company's actual net investment by $95,500,000, and upon the basis of operating expenses which failed to give full effect to wage increases already made by appellant for the calendar year 1948 or any effect to imminent wage increases for 1949 (and which, as has been shown, would produce a return of only 4.38 per cent upon a true net investment base of original cost less depreciation per books of account), in the face of uncontradicted evidence showing that appellant required a return of 6.24 per cent to attract necessary capital, results in the confiscation of appellant's property without due

process of law and in the denial to it of the equal protection of the laws.

Bluefield Water Works Co. v. *Public Service Commission*, 262 U. S. 679;
Federal Power Commission v. *Hope Natural Gas Company*, 320 U. S. 591.

6. As presently construed, the provision for recoupment is a completely inadequate and uncertain safeguard against irreparable loss, inflicted upon the Company under the guise of temporary rates

It is clear that in opposing jurisdiction in this appeal, the Commission relies primarily upon the "recoupment provision" of Section 114* as the validating ingredient of what otherwise would concededly be an unconstitutional process of rate-making (*Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43). It is claimed not only that the recoupment provision renders inapplicable in this case long-established constitutional standards of procedural due process, and thus justifies the most arbitrary sort of procedure in the determination of temporary rates, but also that the promise of recoupment obviates the confiscatory effect of temporary rates, regardless of the duration and amount of the losses suffered by the utility under those rates.

The first answer to these claims is that procedural due process is not satisfied solely because the question of confiscation is not present (*Railroad Comm'n* v. *Pacific Gas*

---

*The concluding paragraph of that Section provides that:

"* * * The commission is hereby authorized in any proceeding in which temporary rates are fixed, determined and prescribed under this section, to consider the effect of such rates in fixing, determining and prescribing rates to be thereafter charged and collected by said public utility company on final determination of the rate proceeding."

Co., 302 U. S. 388, 392-393; see pp. 23-24, 27, 34, *ante*). The second answer is that, unless the realities of the situation are to be ignored, the practical construction given by the Commission itself in this case, as well as in others, to the obligation to provide recoupment, destroys the efficacy of the statute as a safeguard.

At the outset, we note that in the more than sixteen years in which Section 114 has been in existence, no single utility has ever been granted recoupment. Although the Court of Appeals has stated that recoupment operates to prevent any loss, the reference has always been to prospects for the future and never to an actuality of the past. A rational evaluation of the adequacy of recoupment can only be made in the light of that fact.

As the Legislature undoubtedly contemplated in Section 114, the recoupment provision was but one element of an integrated scheme for fixing temporary rates. In recognition of the fact that the efficacy of recoupment would depend in large part upon the amount to be recouped, the Legislature sought to insure that the temporary rates would approximate, as nearly as was consistent with the statutory objective to facilitate prompt action, the permanent rates ultimately to be established. In an earlier case, the Commission had stated this general objective of a temporary rate order, as follows (*Re Syracuse Transit Corporation*, P. S. C. Case No. 11623, 59 P. U. R. (N. S.) 170, at p. 185):

> "In establishing temporary rates, the fares to be established under the statute should approximate rates which can be reasonably expected to be sustained after completion of the hearings and the fixing of final rates."

To insure this approximation of temporary and permanent rates, the Legislature established certain safeguards. First, it provided for a net investment rate base derived from the books of the utility company. Obviously, a

utility was in no position to impeach its own books.* Next, a minimum was established below which the Commission could not go in the fixing of temporary rates. As Governor Lehman noted in approving Section 114, this minimum was adapted to "the most unfavorable conditions", since if depression conditions did not prevail "it would undoubtedly be true that a 5 per cent return would not be a reasonable rate" (see p. 31, *ante*). Moreover, as the Governor stated, the statute did not prescribe a maximum, but left it to the Commission "to determine the exact rate under the conditions that obtain."

Under Section 114, as that section was first construed by the Court of Appeals in the *Bronx Gas & Electric Co.* case, cited *ante,* recoupment was deemed an adequate safeguard against confiscation where the temporary rates were designed to provide a return "within reasonable limits" of the return expected under permanent rates, upon a net investment base derived from the Company's books. The conclusion there reached finds support in the fact that the amount to be recouped could hardly be significant in view of the manner in which the temporary rates were determined. In such a situation, recoupment might justify a short-cut temporary rate because, upon a balancing of interests, the benefit to customers in an immediate reduction outweighs the possibility that, although not so intended, the rate might later prove to have fallen short of adequacy.

To recognize the reasonableness of the conclusion reached by the Court in the *Bronx Gas & Electric Co.* case

---

* In *Wisconsin Telephone Company* v. *Public Service Commission,* 232 Wis. 274, at p. 305, 287 N. W. 122, at p. 138, the Wisconsin Supreme Court stated, with reference to the New York statute:

> "* * * When a rate base is derived from the books and provision is made for amortization of losses if application of the rates produce a loss, the company is fully protected and may not complain."

is not, however, to hold that recoupment justifies the arbitrary imposition upon a utility company of rates shown in advance to be confiscatory. It is one thing to say that, consistently with constitutional requirements, the Commission may fix a rate for a temporary period which will approximate, as nearly as a fair consideration of existing evidence will afford, a reasonable return to the Company. It is an altogether different thing to assert, as the Commission does in the present case, that it need not try, upon the basis of the evidence before it, to fix rates that will be adequate and reasonable, but, on the contrary, may fix rates which even a cursory examination of the evidence discloses must, perforce, be insufficient under constitutional standards.

Under the scheme of temporary rate-making devised by the Legislature, and first construed in the *Bronx Gas & Electric Co.* case, the emphasis was placed upon the manner in which temporary rates were to be determined. Recoupment was regarded as but one of several component safeguards in a carefully integrated scheme.

However, under the present construction of Section 114, the emphasis has shifted to the point where recoupment standing alone is regarded as the Company's protection against confiscation. Thus construed, the entire pattern of temporary rate-making is destroyed, the temporary rates are no longer intended to approximate the permanent rates and recoupment is no longer an adequate safeguard against confiscation.

Also of prime importance in a determination of the efficacy of recoupment, is the duration of temporary rates. For it must be conceded that the longer inadequate temporary rates are continued in effect, the more illusory the promise of recoupment becomes. In recognition of this fact, at least two states have sought to limit the amount to

be recouped by specifically defining the maximum duration of temporary rates.*

Section 114 provides no such protection against the indefinite continuation of temporary rates, and the Court of Appeals has refused to imply any such limitation upon the Commission's power to continue these rates in effect.** According to the Court below (300 N. Y. at p. 203):

> "* * * considerable time, even after the hearings are closed and the record made, may frequently be required for ultimate determination of the very complicated rate problem presented."

In the present case, the Commission has had before it for *more than sixteen months* a record on permanent rates which was closed on December 2, 1948, but it has yet to fix permanent rates. Meanwhile the inadequate temporary rates are continued in effect, the Company's losses mount each day and the prospect of recoupment becomes increasingly illusory.

Illustrative of the wholly theoretical effect of the recoupment provision and the destructive consequence of its nebulous availability is the recorded experience of the Staten Island Edison Corporation. In the case of that company, the Commission issued an order in May, 1943, directing a "temporary" 8 per cent reduction in electric rates. The company's attempt to enjoin the rates in an equity action was unsuccessful because of the promise of recoupment

---

* Both Illinois and Virginia provide that temporary rates may not be set for a period of more than 9 months or a further period of 3 months. See Ill. Rev. Stat. (Cahill, 1933) C. 111a, § 51; Va. Code Ann. (1936) § 4071a.

** In an earlier case, a lower court had stated that a temporary rate "cannot be confiscatory, assuming reasonable progress in the proceeding leading to a final rate" (Unreported Opinion, Record on Appeal (p. 78), *Staten Island Edison Corporation* v. *Maltbie,* 267 App. Div. 72).

(*Staten Island Edison Corp.*, v. *Maltbie*, 267 App. Div. 72; aff'd 292 N. Y. 611).

Two years later, in June 1945, the Commission prescribed as permanent rates the same reduction. In an action in equity, these permanent rates were enjoined *pendente lite* as confiscatory (270 App. Div. 55; aff'd 296 N. Y. 374). The temporary rates were, however, continued. Nearly *six years later*, in March, 1949, the Commission made an order terminating the temporary rate order of May, 1943, abrogating the permanent rate order of June, 1945, and authorizing the company to increase its rates by 5 per cent over those in effect before the temporary rate order of 1943, or 14 per cent over the temporary rates. Although the Commission found that, on the basis of an adjusted rate base, the company had earned in 1948 a return of only 3.36 per cent (Report, P. S. C. Case No. 14187, February 28, 1949), it expressly noted (at p. 31) "that the question of whether or not the presently effective rates and charges [i.e., the "temporary rates" of 1943] yielded a fair return since their institution must be left for further consideration at the time when final rates are prescribed."

Finally, the Commission on December 28, 1949, by a memorandum decision in Cases Nos. 8983 and 14187, granted the Staten Island Edison Corporation a further increase of about 5 per cent in electric rates, but without "attempt" to determine the amount of reimbursement, if any, to which it might be entitled.

In the light of the Commission's administration of Section 114 and the construction which the Court below has placed upon that statute, the promise of recoupment is not a sufficient assurance of just compensation. The taking of property, whether it be in the exercise of eminent domain or in the fixation of rates (*West* v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 671), necessitates the provision

of an adequate, certain and convenient remedy by which the owner can subsequently receive compensation (*Sage* v. *City of Brooklyn*, 89 N. Y. 189). Moreover, as this Court has stated respecting the sufficiency of the provision for compensation in a state statute authorizing the taking of land for public use (*Joslin Company* v. *Providence*, 262 U. S. 668, 677):

> "• • • the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge. • • •"

The more than sixteen years of experience under Section 114 have failed to reveal a single instance in which recoupment has proven an adequate, certain and convenient remedy against confiscation. Section 114 does not pledge anyone's faith or credit to assure the fulfillment of making just compensation when rates prove to be insufficient. All that exists for the protection of a utility which for sixteen months has been suffering daily and mounting losses is the vague and never yet fulfilled promise of recoupment. Endless repetition of a promise to make amends in the future is not a constitutionally adequate safeguard against present harm. "Present confiscation is not atoned for by merely holding out the hope of a better life to come" (*West Ohio Gas Co.* v. *Comm'n (No. 2)*, 294 U. S. 79, 83).

In the last analysis, it should be stressed that in *Driscoll* v. *Edison Co.*, 307 U. S. 104, this Court did not regard the recoupment provision of the Pennsylvania temporary rate statute* as a safeguard against irreparable injury. On the contrary, it was there held that, absent injunctive relief against irreparable injury, the remedy in the State Courts

---

* The Pennsylvania statute was patterned after Section 114 of the New York Public Service Law. See P. L. 1053, Purdon's Pa. Stat. Ann., 1941, Title 66, § 1150.

was not "plain, speedy and efficient." According to the Court (307 U. S. at p. 110):

> "• • • The remedy at law by appeal is ineffective to protect the utility's position *pendente lite*. The supersedeas does not postpone the application of the temporary rates.• • •"

The decision in the *Driscoll* case is a holding by this Court that recoupment is not a "plain, speedy and efficient" remedy to protect a utility against irreparable injury. This, we submit, is authority that the expectation of recoupment is not an adequate remedy against confiscatory rates.•

7. As presently construed, the laws of New York do not afford a safe and adequate judicial review of temporary rates prescribed by the Commission under Section 114

In its argument that effective judicial review of temporary rates is available in the Courts of New York, as in its reliance upon recoupment, the Commission treats with theory and not reality. Perhaps the clearest proof of this is found in the now ironical assertion by the Commission that a stay of a temporary rate order is available upon a proper showing of great and irreparable damage. Ignored completely by the Commission is the statement of the lower Court in the present case, sustaining the Commission's contention as then made, that (193 Misc. 1015, 1018, denying appellant's application for a stay *pendente lite*):

> "The same reasoning that precludes an injunction against a temporary rate in an equity action would preclude the granting of a temporary stay in a proceeding under article 78 of the Civil Practice Act

---

• See Note, 34 Ill. L. Rev. 214, 216, where the author states:

> "• • • when the Supreme Court held that the lower court had jurisdiction under the Johnson Act they were, in effect, saying that a recoupment provision does *not* afford an adequate remedy against temporary confiscatory rates." (Italics in original.)

> whose sole purpose is to review a temporary rate; in other words, when a temporary rate to be charged by a public utility company is fixed by the Commission, in purported accordance with the statute, *the right to a stay, which existed prior to its enactment, still exists theoretically but for all practical purposes, it may fairly be said to be extinct.*" (Italics supplied.)

If, after this decision, there remained any doubts that the right to a stay was only a theory, they were removed by the decision of the Court below, which stated (300 N. Y. 196, at p. 202):

> "On a prior appeal recently before us [same case, 299 N. Y. 172], we held that, in view of the recoupment provisions of section 114, the alleged failure of the commission to follow the requirements of the statute did not warrant an injunction against the enforcement of its order pending appeal, and we accordingly reversed an order of the Appellate Division that granted a stay."

In the face of one decision holding that the right to a stay exists only "theoretically", affirmed by another which states that the Commission's failure to follow Section 114 would not warrant relief pending appeal, the Commission asserts that the right to a stay is one of the Company's protections "against any deprivation of constitutional rights" (Statement Opposing Jurisdiction, p. 13). Surely, unless appellant's constitutional rights are only theoretical, it should not be compelled to rely for their protection upon a remedy which, "for all practical purposes", "may fairly be said to be extinct".

According to the Commission, effective judicial review of the temporary rates is also available under Article 78 of the Civil Practice Act, which affords "a full review of all question of law, including the question of whether there was evidence to sustain the findings of the Commission" (*id.*, at p. 15). Unwittingly, however, the Commission's argument reveals the impracticality of such judicial review as applied to the Commission's actions.

The all-essential fact is that the Commission in this case acted without considering and weighing the evidence before it, without making findings thereon, and without disclosing the reasons and factual grounds underlying its determination. By this arbitrary course of procedure, the Commission rendered meaningless any judicial review, for, as has long been recognized, effective judicial review depends upon a regulatory agency's disclosure of the reasons and factual grounds underlying its determination (See *Wichita R.R.* v. *Public Utilities Commission*, 260 U. S. 48, 58-59; *Mahler* v. *Eby*, 264 U. S. 32; *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, 198).

As stated by Mr. Justice Cardozo (*U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, at p. 511):

> "* * * We must know what a decision means before the duty becomes ours to say whether it is right or wrong".

And in *American Broadcasting Co.* v. *Federal Communications Commission*, 179 F. 2d 437, 444 (C. C. A. Dist. of Col.), it was stated:

> "* * * in a succession of judicial decisions it has been pointed out that the process which the Commission properly follows in reaching a decision includes the taking and weighing of evidence, a determination from attentive consideration of this evidence of facts of a basic or underlying nature, a determination by rational inference from these basic facts of the ultimate facts in the case, and finally, an announcement of the decision of the Commission by application of the statutory criterion. It has been pointed out further that when a decision is accompanied by proper findings of fact, the reviewing court can decide whether the decision reached by the Commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence; but that in the absence of proper findings of fact, the reviewing tribunal can determine neither of these things. * * *"

The experience of this Company and other utilities demonstrates the wholly theoretical nature of the judicial review of temporary rates available in New York. Experience has also demonstrated that neither the equity nor certiorari review of permanent rates, available under New York law, protects the Company against the effect of the temporary rates.

In the *Staten Island Edison Corp.* case, (discussed *ante*, at pp. 39, 40), as also in *County Transportation Company* v. *Maltbie*, 273 App. Div. 437, aff'g in part 189 Misc. 743, the Commission after considerable delay fixed permanent rates at the same level as the temporary rates. Although, in each case, the company succeeded in enjoining the permanent rates, nevertheless the identical temporary rates were held to continue in effect. Thus, judicial review in New York of confiscatory permanent rates afforded nothing by way of relief against temporary rates.

We submit that this denial of all effective judicial review of the Commission's order prescribing temporary rates operates to deprive the appellant of its property without due process of law and to deny to it the equal protection of the laws.

Chicago, M. & St. P. Railway Co. v. *Minnesota*, 134 U. S. 418.

8. As presently construed, Section 114 constitutes a grant of arbitrary power

Under the decision of the Court below, Section 114 enables the Commission to avoid its duty to fix permanent rates upon the completed record before it, and to prescribe, instead, temporary rates for an indefinite period, upon a rate base adopted by it as a matter of administrative fiat. With the unfettered discretion now granted to it by that decision, the Commission is authorized to determine temporary rates without considering and weighing relevant

evidence on the all-important questions of depreciation and rate of return, without making any finding upon the evidence before it and without disclosing in any way the reasons and factual grounds which begot its urgent determination.

The construction which the Court below has placed upon Section 114 renders that statute squarely in conflict with decisions of this Court which prohibit arbitrary grants of power to regulatory agencies.

> *Yick Wo* v. *Hopkins,* 118 U. S. 356;
> *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88, 91;
> *Southern Railway Co.* v. *Virginia,* 290 U. S. 190;
> *Panama Refining Co.* v. *Ryan,* 293 U. S. 388;
> *Schechter Corp.* v. *United States,* 295 U. S. 495.

The unlimited discretion granted to the Commission under Section 114 is the very sort of power to which this Court referred, when it stated (*Bradley* v. *Richmond,* 227 U. S. 477, 481):

> "• • • An ordinance which commits to a board, committee or single official the power to make an *arbitrary* classification for purposes of taxation, would meet neither the requirement of due process, nor that of the equal protection of the law." (Italics in original.)

We respectfully submit that, for the reasons stated, substantial Federal questions have been shown to exist in this case, and that accordingly the appellees' motion to dismiss or affirm should be denied.

II. The order and judgment confirming the temporary rate order are final for the purpose of an appeal to this Court.

The Federal questions presented by this appeal are whether the promise of recoupment in the future justifies a present denial of procedural due process, the imposition of confiscatory "temporary" rates for an indefinite period and the withdrawal of all effective judicial review of the Commission's action. According to the Commission, the Federal issues thus presented are "wholly premature" since appellant's constitutional rights are fully protected by the recoupment alleged to be available in the fixing of permanent rates (Statement Opposing Jurisdiction, p. 17).

The circuity of the Commission's reasoning is apparent. It assumes as a premise the answers to the very questions before this Court. A holding by this Court that the issues presented are premature would constitute, in effect, an acceptance of the Commission's argument that the validity of its action "cannot properly be tested by reference to constitutional standards of procedural due process" (Statement Opposing Jurisdiction, p. 13) and a rejection of appellant's constitutional claims.

If appellant's contentions are valid, and recoupment is not an adequate constitutional safeguard, there is an "immediate threat of irreparable damage * * *, rendering postponed review so illusory as to make the decree 'final' now or never" (*Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 70).

The Commission's action in prescribing temporary rates has subjected the Company to a present obligation, "immediate and absolute," to charge the prescribed rates for its contemporaneous service, and the order and judg-

ment appealed from are thus final for the purpose of an appeal to this Court.

> *Knox Loan Ass'n* v. *Phillips*, 300 U. S. 194, 198; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69.

III. The Federal questions raised herein are not res judicata.

In reversing the Appellate Division, which had granted appellant's motion for a stay of the temporary rates pending appeal, the Court of Appeals held that the recoupment provision of Section 114 precluded any finding of great and irreparable damage* (299 N. Y. 172). According to the Commission, the decision of the Court of Appeals upon the question of interlocutory relief was appealable to this Court and the absence of such appeal has the effect of finally adjudicating the issues herein (Statement Opposing Jurisdiction, pp. 17-18).

The fallacy in this argument is twofold.

First. It assumes, contrary to a long line of decisions, that the decision of the highest court of a State on a question of interlocutory relief is appealable to this Court. As this Court has stated (*Moses* v. *The Mayor*, 15 Wall. 387, 390):

> "* * * Obviously, there was no final decree. The only decree rendered in the Supreme Court was that the injunction [preliminary] of the court below be dissolved. That decree was in no sense final. It left the whole case to be disposed of upon its merits. This has been frequently decided."

---

* Section 23(2) of the New York Public Service Law requires specific findings of great and irreparable damage by any Court issuing an injunction against a rate order of the Commission.

Established beyond contention is the fact that this Court does not view as final, for the purpose of an appeal, the decision of a state court upon a question of interlocutory relief.

Gibbons v. *Ogden*, 6 Wheat. 448;
Verden v. *Coleman*, 18 How. 86;
Brannan v. *Harrison*, 284 U. S. 579;
Williams v. *Quill*, 303 U. S. 621.

See also, Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, p. 67; Boskey, Finality of State Court Judgments Under the Federal Judicial Code, 43 Col. L. Rev. 1002, 1017.

SECOND. Even if it were assumed that the decision upon the question of relief *pendente lite* might have been appealed to this Court, the absence of such an appeal could not preclude an adjudication of the issues presented in the proceeding upon the merits. For as this Court has stated with respect to the *res judicata* effects of decisions upon questions of interlocutory relief (*Denny* v. *Bennett*, 128 U. S. 489, at p. 499):

> "* * * we concur with the Supreme Court of the State of Minnesota * * * in holding that 'it was merely a decision of a motion or summary application which is not to be regarded in the light of *res adjudicata* * * *.'"

And as the Court below has held (*Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462, 474):

> "* * * The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for * * *."

See also *Hunt* v. *Seeley*, 115 F. 2d 205 (C. C. A. 5th); 50 C. J. S. § 620.

CONCLUSION

The appellees' motion to dismiss or affirm should be denied and this Court should retain jurisdiction of the appeal.

Dated, May 18, 1950.

Respectfully submitted,

WHITMAN, RANSOM, COULSON & GOETZ,
Attorneys for Appellant.

JACOB H. GOETZ,
RICHARD JOYCE SMITH,
CAMERON F. MACRAE,
BERNARD L. SANOFF,
Counsel for Appellant.

POOR COPY
BLEED THROUGH